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NO. 80-1808

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PACIFIC NORTHWEST CHAPTER OF THE
ASSOCIATED BUILDERS & CONTRACTORS, INC.

PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

RESPONDENT

REPLY BRIEF OF PETITIONER PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS, INC.

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ARGUMENT

This brief responds to the brief of the National Labor Relations Board in opposition filed in No. 80-1808.

This response will deal with two subject matters. First will be to discuss the importance to the construction industry of a grant of a writ of certiorari. Second will be to discuss the substantive opposition of the Board.

I.

The Importance of Granting A Writ of Certiorari

The issue in this case, lawfulness of a massive restraint upon subcontracting within the construction industry, has national application. It will effect every job site nationwide; it will have dramatic impact within the process of future collective bargaining and it will create national labor unrest when employers refuse to acquiesce in a bargaining demand for inclusion of subcontracting restraints within their collective bargaining agreements.

The consumer will predictably suffer higher cost of construction. Incremental cost increase will be the by-product of a lack of competition between contractors

because of this arbitrary contractual disqualification.

The sword thrust of this decision slices deep into the heritage of the American economy. It violates the precepts of the Sherman Act. It frustrates the rights of employees bestowed by the National Labor Relations Act. Concepts of industrial due process are transgressed. It is thus ironic that unless this Court grants certiorari, the decision of the Board with its sweeping implications, will become the law of the land by default.

Only the General Counsel's office has authority to issue complaints. This authority is exclusive and unreviewable. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138-139 (1975). No case can be considered by the Board or by any Court, absent issuance of a complaint by the General Counsel's office. In consequence of the Board's decision here, the General Counsel discontinued issuance of complaints in November, 1978.

Unless this Court grants the Petition, no court will be permitted to review the fundamentally important questions presented. The law of the Board will be the law of the land. The office of a writ of certiorari is to prevent this very occurrence. It is precisely this type of case

in which review[1] by the Supreme Court is most appropriate.

II.

The Substantive Analysis of the Board Is Without Merit

The Board's argument contains five components:

A. The construction industry proviso is intended to meet two objectives:

1. Avoidance of friction that may arise between union and nonunion workers who work shoulder-to-shoulder; and

2. Maintenance of wage and fringe benefit levels. (Board Brief, p. 8);

B. That a contrary decision would create "immense practical problems" (Board Brief, p. 9);

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[1]Since the filing of the Petition for Certiorari, three per curiam decisions involving the same issue have been handed down by the Ninth Circuit on a per curiam basis. They are Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, Case No. 79-7330 (combined with cases 79-7340 and 79-7355)); Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. NLRB, Case No. 79-7341 (combined with cases 79-7331 and 79-7369); and Swanson-Dean Corp. v. Carpenters, ___ F. 2d. ___, 107 LRRM 2612 (9th Cir. 1981). Counsel for petitioner is attorney in cases 79-330 and 79-7341. Whether a Petition for a Writ of Certiorari will be filed in these cases is dependent upon the Court's determination here.

C. That the Section 8 (e) proviso was intended to preserve the "pattern of bargaining" within the construction industry (Board Brief, p. 9);

D. That a single sentence extracted from Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) mandates the conclusion sought by the Board (Board Brief, p. 10); and

E. That the limited evil which the Supreme Court in Connell sought to eradicate was to close a loophole in Section 8 (b) (7). (Board Brief, p. 11)

None of these arguments furnish support to the conclusion of the Board or the Court of Appeals. Each are flawed by a lack of careful analysis.

A.

The Objective Of the 8 (e) Proviso

The Board urges that Congress had two purposes in mind when the proviso to 8 (e) was enacted. The first, and primary purpose, was avoidance of job-site friction which would be promoted by union and nonunion employees working side-by-side. The second is maintenance of "union standards."

While this Court in Connell appears to have concluded that the sole objective of the proviso to Section 8 (e) was avoidance of friction, even a duality of objective would not save the restraint here.

It has been commonplace for this Court to analyze restraints in terms of whether a legitimate objective could be achieved

through less restrictive means. This is the litmus test for rule of reason anti-trust scrutiny. Siegel v. Chicken Delight, Inc. 488 F. 2d. 43, 51 (9th Cir. 1971), cert. den., 405 U.S. 955 (1972); Copper Liquor, Inc. v. Adolph Coors Co., 506 F. 2d. 934, 942-43 (1975). It has also been invoked as part of a balancing test in weighing First and Fourteenth Amendment rights against Section 7 requirements of the National Labor Relations Act. Hudgens v. NLRB, 424 U.S. 507 (1976).

There are two types of restraint on subcontracting. The first is a "union signatory" clause. Under such subcontracting restraint, the employer may deal solely with an employer who has contracted to adhere to each and every term of a collective bargaining agreement, including both its economic and its noneconomic provisions.

The second type of restraint is what is know as a "unions standards" agreement. Under the terms of this type of restraint, a subcontractor can be employed only if it matches the economic provisions of the industry's area collective bargaining agreement. This latter category of agreement contains no complusion to join any union but merely assures that competition between contractors will not be based upon substandard wages and/or working conditions.

It should be apparent that if Congress intended the 8 (e) proviso to promote dual objectives, such a purpose could be satisfied by a less restrictive area standards subcontracting provision coupled with a prohibition upon subcontracting to nonsignatory contractors at job sites when employees of signatory

contractors performing jurisdictionally similar work are contemporaneously present. To permit broader language than appropriate to satisfy the limited objectives of the statute, is to trample upon Section 7 rights of employees.

B.

There Are No Insurmountable Or Immense Practical Problems That Would Result From Declaring The Subcontracting Provision To Be Unlawful

The Court of Appeals stated that limiting subcontracting agreements to instances where job-site friction will arise creates immense practical problems. (Board Brief, p. 9)

This pragmatic argument was not one which the Board considered, nor was it part of its decision-making process. It was manufactured from whole cloth by the Ninth Circuit without benefit of written or oral argument. The term "make weight" seems most apt.

At no time has ABC contended that there should be "job-site-by-job-site" negotiation of collective bargaining agreements. It is a simple matter to write a collective bargaining agreement to conform to the objective of the proviso. There is no logical reason why the duration of such an agreement must be limited to specific projects. It, like all others, could be written for an extended term.

The Board and the Ninth Circuit also urged that the "shoulder-to-shoulder" test must be disregarded because of difficulty in policing job sites to determine whether there was "any union worker" on the job

site at any time. The contention is plain nonsense. First, a member of a union may work for a union or a nonunion contractor. The fact of membership in a union does not foreclose working for a nonunion contractor. Free choice is one of the underlying tenets of the Act. The problem then is commingling of union members employed by a contractor privy to a collective bargaining agreement with a union and the employees of a nonunion contractor. This is the theoretical caldron of boiling oil.

Typically unions call for and have pre-job conferences with the employer. During the pre-job conference the identity of each subcontractor is disclosed. The projected timing of the presence of each subcontractor on the job site is disclosed. The employer may be requested to give the union specific written advance notice of when nonunion contractors will be present. Thus the union knows or has the means to know when a nonunion contractor will be present on the job site.

This is a simple extension of boiler plate secondary boycott dogma. Common situs picketing is proper only when the employees of the primary employer are present.[2] To assure that informational picketing does not lapse into secondary, the general contractor provides advance written notice of when the primary contractor and his employees will be working on

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[2] Carpenters Council of Milwaukie, 196 NLRB 487, 490, No. 60 (1962), Local Union No. 519, United Association of J A of Plumbers, Inc. v. NLRB, 416 F. 2d. 1120, 1124-1146 (D.C. Cir. 1969).

the job site. Thus avoidance of job site friction and of the effects of informational picketing upon neutral employees has produced a practical convention which may be applied, without change, to subcontracting with nonsignatory subcontractors.

Additionally, construction industry unions have historically policed the job site for a variety of purposes. One purpose has been compliance with a labor contract. The second has been to ascertain the presence of a nonunion contractor so that direct informational pickets may be erected. A declaration that subcontracting restraints in the AGC/701 agreement were unlawful would not change this "policing" aspect of their long-standing relationship one iota.

Even if it were assumed that escalated policing would be required, what does this mean? It suggests the absence of friction at the job site. It suggests that union and nonunion workers can and do work side-by-side without antagonism. It appears, however, that this conclusion is legislatively foreclosed and it must therefore be conclusively presumed that the mixing of oil and water at the job site will indeed produce immediate input to the union from enraged union workers and an appropriate response.

C.

The Board's "Pattern of Bargaining" Argument Is Inconsistent With This Court's Connell Analysis.

The Board promotes a simple syllogism:

1. There was a pattern of bargaining in 1959.

2. Congress intended the 1959 amendments to preserve the pattern of bargaining.

3. Therefore, each and every form of restraint upon subcontracting predating 1959 is lawful. Like may syllogisms, the conclusion is only as sound as its minor and major premise.

The minor premise is that there was a pattern of bargaining. As proof, the Board now proffers the Lunden Report.[3]

Curiously, in rushing to this conclusion the Board fails to reflect upon at least three impediments. First, the Board's own General Counsel, after conducting a painstaking investigation of the construction industry and the usage of subcontracting clauses in 1959, concluded:

> "* * * Moreover, the study did not deal with the precise issue involved herein, viz., whether and to what extent there existed 'particular union' subcontracting clauses in the construction industry in 1959."
>
> Labor Relations Yearbook (1976), p. 308.
>
> "In view of the fact that the Lunden study was inconclusive on the instant issue, the Office of the General Counsel undertook its own study of construction

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[3]"Subcontracting Clauses In Major Contracts: by Leon E. Lunden, pp. 579-586 and 715-723.

> industry clauses existing in 1959. * * *"

ibid. pp. 308-309.

> "From this review of the contracts existing in 1959, the only clear lesson that emerges is simply that there was no uniformity in the subcontracting clauses that existed in the construction industry at the time. If the term 'pattern of collective bargaining' means a uniform dominant practice in the industry, it would appear that there was no such pattern. The only 'pattern' that does emerge is that of a mosaic * * *. * * *" (Emphasis Added)

ibid. p. 309.

Second, this Court in Connell rejected the identical argument. It concluded that rather than to constitute an adoption of the common law of bargaining Congress instead intended the proviso to be a "partial substitute" for an attempt to overrule this Court's decision in NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S. Ct. 943, 95 L. Ed. 1284 (1951); Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 95 S. Ct. 1830, 1838 (1975).

Third, the argument proves too much. General Counsel has previously acknowledged that agreements of the sort present in Connell were part of the 1959 mosaic. If such were true, then either the Connell decision cannot stand or the Board is wrong. Labor Relations Yearbook (1976), p. 309.

D.

The Mysticism of Sentences Out Of Context

The Board, by seizing language out of context from the Connell decision asserts that any and all restraints upon subcontracting if obtained in the context of collective bargaining are lawful.

To support this proposition it quotes the following passage from Connell:

> "* * * Its (the 8 (e) proviso) authorization extends only to agreements in the context of collective bargaining relationships and in light of congressional references to the Denver Building Trades problem, possibly to common site relationships in particular jobsites as well."

The Board reads this phrase in the disjunctive. It thus asserts that all restraints on subcontracting in the context of collective bargaining are lawful. It further urges that even in the total absence of a collective bargaining relationship, that restraints on subcontracting are lawful provided the common situs Denver Building Trades type relationship is present on a specific job site.

The Opinion of this Court, however, cannot be understood by slicing a single sentence from it and totally ignoring the context within which it was presented. It is apparent that this Court meant the phrase to be read in the conjunctive and that secondary restraints on subcontracting would be construed as lawful only when:

1. They were negotiated in the context of a collective bargaining relationship; and

2. They cured common site friction on particular job sites.

E.

The Purported 8 (b) (7) Loophole Furnishes No Support To The Board

The Board postulates that the collective bargaining agreement in Connell was sui generis; that picketing to obtain it would not be interdicted by 8 (b) (7); and that therefore this Court crafted an 8 (e) remedy.

The premise of this argument is that 8 (b) (7) regulates solely primary picketing, i.e., that which is addressed to the relationship of the employer and employee being picketed. The words of 8 (b) (7) do not lend support to this contention. The prefatory words to the statute interdict picketing

> "* * * any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization. * * *"

If it had been the intent to limit the scope of 8 (b) (7) to primary picketing, the article "the" would have been used in lieu of "and".

Second, this construction comports with common sense. Congress could not have intended to condemn organizational and recognitional picketing in its primary sense but not have granted relief from the

effect of the economic leverage of a general contractor, enlisted by the union, to compel a third party subcontractor to recognize and deal with the labor organization.[4]

Third, the Board has recognized the broad remedial scope of 8 (b) (7). For example, the General Counsel's office has interpreted 8 (b) (7) to interdict all forms of picketing to achieve a prehire agreement. Such agreements are executed prior to the time that an employer has any employees on its staff. It is free to choose to hire through the union hall, or alternately, may choose to subcontract the work to a third party.

As the General Counsel's office concluded:

> "* * * Where a construction industry employer has no unit employees or less than a representative complement, and a union pickets to obtain an 8 (f) contract, it is our view that since a question concerning representation could not be raised and an expedited election could not be held, such picketing would be violative of Section 8 (b) (7) (C) from the first day. * * *."
>
> Labor Relations Yearbook (1979), p. 354.

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[4]This is the obverse side of the 8 (b) (4) coin which condemns picketing where the object is to force a neutral not to do business with the primary employer. Here the secondary employer is being deployed as an organizational tool to permit continuation of business relationship.

The above factors make it reasonable to conclude that 8 (b) (7) does provide remedies against secondary as well as primary picketing to obtain an organizational and/or recognitional purpose.

Even if this were not true, the Board's assertion that the evil which the Connell court sought to address is not present in the context of the collective bargaining relationship simply is a misstatement. (Board Brief, p. 10) The overriding concern of the Court was utilization of a tactic which compelled organization upon third party employers and employees. It was this evil which dominated the Court's thinking. The effect of top-down organizing on third parties is the same whether there be a collective bargaining relation between the union and the immediate employer.

CONCLUSION

The parties concede that the issues tendered are of national importance. The parties concede that they have an impact upon virtually every segment of the national economy. The parties must concede that the issues are rife with antitrust overtones and the economic implications which radiate from it.

The issues are ripe for decision. The record presents no fact controversy. It is indeed the last opportunity that this Court will have on any record to consider the

issue. It is respectfully submitted that this Court should grant certiorari to review each question.

Respectfully submitted,

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